APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 07-4500 & 07-4564

ALASKA ELECTRICAL PENSION FUND; CITY OF SARASOTA FIREFIGHTERS' PENSION FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN; NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND; PACE INDUSTRY UNION-MANAGEMENT PENSION FUND; CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, as Class Representatives, on behalf of themselves and all other similarly situated

v.

PHARMACIA CORPORATION; PFIZER, INC.; FRED HASSAN; DR. G. STEVEN GEIS; CARRIE COX

Alaska Electrical Pension Fund; City of Sarasota Firefighters' Pension Fund; International Union of Operating Engineers Local 132 Pension Plan; New England Health Care Employees Pension Fund; Pace Industry Union-Management Pension Fund; Chemical Valley Pension Fund of West Virginia,

Appellants in 07-4500

Pharmacia Corporation; Pfizer, Inc.; Fred Hassan; Dr. G. Steven Geis; Carrie Cox,

Appellants in 07-4564

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil Nos. 3-03-cv-01519, 3-03-cv-01691, 3-03-cv-01808, 3-03-cv-01964, 3-03-cv-02149, 3-03-cv-02283)
District Judge: The Honorable Anne E. Thompson

Argued: November 21, 2008

Before: BARRY, CHAGARES, *Circuit Judges,* and RESTANI, **Judge*

(Opinion Filed: January 30, 2009)

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

BARRY, *Circuit Judge*

In this securities fraud class action, plaintiffs allege that defendants violated §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 by making, with scienter, materially false statements about a clinical study of Celebrex, a popular anti-inflammatory medication. In particular, defendants are alleged to have misled investors by distorting the study's results with the intent to show that Celebrex had a better safety profile than similar medications. Finding the action to be untimely, the District Court granted summary

judgment to defendants. This appeal and cross-appeal followed.

I. Factual Background

Celecoxib, known and marketed commercially as Celebrex, is an anti-inflammatory prescription drug sold by defendant Pharmacia Corporation. Substantially more expensive than many other nonsteroidal anti-inflammatory drugs ("NSAIDs"), Celebrex's promise was rooted in the hope that it would cause fewer gastrointestinal ("GI") side-effects than the less costly NSAIDs.[1] To help the hope become a reality, defendants[2] commissioned a long-term clinical study of Celebrex's effect on the GI system, the Celecoxib Long-term Arthritis Safety Study ("CLASS study"). This litigation focuses on the aftermath of that study.

According to the complaint, the results of the CLASS study were a disappointment to defendants: Celebrex did not show the desired reduction in GI side-effects as compared to the other drugs studied. Fearing a decrease in sales and stock price, defendants allegedly undertook to distort the results of the study so that it would appear that Celebrex possessed a better GI safety profile than, in fact, it did. Towards this end, in April 2000, defendants released only the results from the first six months of the

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[1] Unlike traditional NSAIDs, which inhibit both the COX-1 and COX-2 enzymes, Celebrex is a selective COX-2 inhibitor. Because the inhibition of COX-1 enzymes often leads to negative GI side-effects, it was hoped that selective COX-2 inhibitors would not possess the harmful side-effects associated with traditional NSAIDs.

[2] Defendants include Pharmacia Corp., Pfizer, Inc., and individual defendants Fred Hassan, Steven Geis, and Carrie Cox.

CLASS study; those results, divorced from the entire set of data, were capable of positive construction.

Defendants released the truncated results of the CLASS study with great fanfare, declaring that the study "shows that Celebrex has a truly exceptional safety profile," and that "the long-term outcome data paints a clear and compelling picture of Celebrex's safety versus NSAIDs." (Joint App. ("JA") 59, 64.) Some documents issued by defendants noted that the CLASS study lasted a full thirteen months, but the reason for excising the last seven months from the analysis was not revealed.

Scientists affiliated with defendants then drafted an article based on the truncated results and submitted it for publication to the *Journal of the American Medical Association* ("JAMA"). As would become known only later, however, neither defendants nor the article's authors informed JAMA that the data in the article was incomplete. In September 2000, JAMA published the article, which reached the following conclusion: "The overall incidence of GI symptoms experienced by patients taking [Celebrex] was significantly lower than by those taking NSAIDs, as was the rate of withdrawal [from the study] due to GI intolerability." (*Id.* at 45.)

Defendants hoped to convince the FDA to allow Celebrex to be marketed without the standard GI warning label required for other NSAIDs, and so submitted the complete data from the CLASS study to the FDA in June 2000. FDA staff members, in preparation for hearings on the warning label issue, reviewed the data. On February 6, 2001, the reports of those staff members were published on the FDA's website, alongside defendants' own report. Defendants' report defended the decision to use only the

truncated data, asserting that data after the six-month point was biased in favor of the comparator drugs:

> The GI safety data presented are for the six-month treatment timepoint based on the analysis of risk factors prespecified in the protocol. In brief, a disproportionate withdrawal of patients at high risk of an ulcer complication from the entire study was observed after six months (depletion of susceptibles). Additionally, a significantly greater withdrawal of patients on diclofenac for GI intolerance occurred during the initial six months of the study. The withdrawal of patients for GI intolerance prematurely removed a group at high risk for ulcer complications and symptomatic ulcers from the diclofenac treatment arm (informative censoring).

(*Id.* at 381.)

The FDA staff reports, stating in part as follows, disagreed with defendants' reliance on the truncated data:

> • A rheumatologist's report stated that it was "unclear" that the rationale put forth by defendants "represented a significant bias in assessment of the outcome." (*Id.* at 631.)
>
> • A gastroenterologist's report stated that defendants' "rationale for analyzing the first 6 months as a meaningful endpoint independent of the success at the study completion is not convincing." (*Id.* at 472.) However, this report also stated that "[t]he six-month analysis will be reviewed only as a potentially supportive analysis." (*Id.* at 482.)

- A statistician's report rejected the six-month analysis as "not valid," and asserted that there was "no reason to include information only in the first 6 months." (*Id.* at 666.)

These reports were prepared to assist the FDA's Arthritis Advisory Committee ("Advisory Committee") in deciding whether to recommend the label change sought by defendants. The day after the publication of the reports, the Advisory Committee held hearings on the issue, and ultimately declined to recommend the label change. The staff reports and the Advisory Committee's recommendation received substantial media attention. The market also took note of the disappointing outcome: between February 6-8, 2001, the price of Pharmacia's stock dropped approximately 9.0%.

After these events, defendants issued a series of positive statements about Celebrex's GI safety profile as well as about the chances for a label change. Defendants claimed, for example, that the CLASS study data presented a "compelling case" for a label change, and that because the CLASS study was "an extremely rigorous and complex trial," it was "difficult for the [Advisory Committee] to analyze." (*Id.* at 171, 1519.)

Financial analysts also continued to rate Pharmacia's stock positively. Even while noting the reduced chances for a label change and the disagreement over the results of the CLASS study, JP Morgan, Merrill Lynch, Lehman Brothers, and Bank of America all continued to rate Pharmacia's stock as a "buy" or "strong buy." Several analysts noted the challenge to defendants' use of truncated data: JP Morgan wrote that the staff reports called the six-month analysis "unjustified and invalid," and Bloomberg News wrote that defendants were only able to show a benefit "by

looking at selected parts of the data—a practice discouraged by the [FDA]." (*Id.* at 714, 719.)

Months later, on August 5, 2001, the Washington Post reported that defendants had withheld the full CLASS study data from JAMA. In the article, JAMA's editor described herself as "disheartened" and stated that "a level of trust . . . was, perhaps, broken." (*Id.* at 203.) Additionally, a scientist who wrote an editorial published in conjunction with the JAMA article stated that he was "flabbergasted" when he saw the complete data; another scientist "said he complained to JAMA after noticing differences between the published [JAMA] report and the data presented to the FDA." (*Id.* at 203-04.)

After the Washington Post article raised the red flag of impropriety, other sources began to question defendants' good faith. For example, an article from The Sunday Times noted that the scandal involving the CLASS study had inspired medical journals to "stop drug firms from 'cheating' on medical studies." (*Id.* at 1360.) On June 1, 2002, an article in the British Medical Journal called the "explanations for [the] serious irregularities [in the JAMA article] . . . inadequate." (*Id.* at 757.) The article also stated that "[p]ublishing and distributing overoptimistic short term data using post hoc changes to the protocol, while omitting disappointing long term data of two trials . . . is misleading." (*Id.*) Following the publication of this article, the price of Pharmacia's stock dropped 7% in three days.

II. Procedural History

This action was initiated on April 7, 2003, when the first securities fraud class action complaint was filed. Related actions were shortly thereafter consoli-

dated into it. The District Court denied defendants' motion to dismiss and granted plaintiffs' motion for class certification, but shortened the class period by more than a year, finding that investors could not have reasonably relied on defendants' alleged misrepresentations after February 6, 2001, the date on which the FDA staff reports were published.

Defendants subsequently moved for summary judgment on statute of limitations grounds, asserting that if reliance was unreasonable after February 6, 2001, plaintiffs must necessarily have been on inquiry notice of their claims at that time. Because the first securities fraud suit was filed on April 7, 2003, and the statute of limitations for § 10(b) claims is two years, *see* 28 U.S.C. § 1658(b), defendants asserted that plaintiffs' claims were untimely. The District Court agreed, and granted defendants' motion for summary judgment.

The cross-appeals of the parties are now before us for our consideration.

III. Jurisdiction and Standard of Review

The District Court had jurisdiction pursuant to 15 U.S.C. § 78aa. We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the Court's decision to grant defendants' motion for summary judgment and the decision to deny their motion to dismiss. *See, e.g., Mest v. Cabot Corp.*, 449 F.3d 502, 510 n.7 (3d Cir. 2006); *Farber v. City of Patterson*, 440 F.3d 131, 134 (3d Cir. 2006). The decision to certify a class action and the determination of the class period are reviewed for abuse of discretion. *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 136 (3d Cir. 2000).

IV. Legal Analysis

There are a number of issues before us on these appeals. Plaintiffs challenge, first and foremost, the District Court's grant of summary judgment on statute of limitations grounds. Plaintiffs also dispute the Court's determination of the class period. On cross-appeal, defendants assert that the Court erred in denying their motion to dismiss, and in granting plaintiffs' motion for class certification. We address each of these issues in turn.

A. Inquiry Notice and the Statute of Limitations

The District Court determined that investors were on inquiry notice of possible securities fraud as of February 2001. The statute of limitations will begin to run when the plaintiff is on inquiry notice. "Whether the plaintiffs, in the exercise of reasonable diligence, should have known of the basis for their claims depends on whether they had sufficient information of possible wrongdoing to place them on inquiry notice or to excite storm warnings of culpable activity."[3] *Benak ex rel. Alliance Premiere Growth Fund v. Alliance Capital Mgmt., L.P.*, 435 F.3d 396, 400 (3d Cir. 2006) (internal citations and quotations omitted). The inquiry notice determination requires a "totally objective" analysis that pinpoints the time at which "a reasonable investor of ordinary intelligence would have discovered the information [demonstrating possible liability] and recognized it as a storm warning." *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 252 (3d Cir. 2001).

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[3] Plaintiffs do not contend that they "exercised reasonable due diligence and yet were unable to discover their injuries." *Mathews v. Kidder, Peabody, & Co., Inc.*, 260 F.3d 239, 252 (3d Cir. 2001). Thus, if we find storm warnings of fraud, plaintiffs' claims are untimely.

In line with this objective analysis, plaintiffs are "presumed to have read prospectuses, quarterly reports, and other information relating to their investments." *Id.* However, the hypothetical reasonable investor need not be a scientific expert; to the contrary, the relevant inquiry is whether a reasonable investor of "ordinary intelligence" would have recognized the available information as indicative of possible fraud. *Id.*

Inquiry notice seeks to deter putative plaintiffs from sitting on their hands, awaiting the discovery of the elusive smoking gun. Inquiry notice will thus be triggered when plaintiffs "should have discovered the general fraudulent scheme," *In re NAHC, Inc. Secs. Litig.*, 306 F.3d 1314, 1326 (3d Cir. 2002) (internal citations and quotations omitted), and "cannot avoid the time bar simply by claiming they lacked knowledge of the details or narrow aspects of the alleged fraud." *Benak*, 435 F.3d at 400 (internal citations and quotations omitted).

Our recent decision in *In re Merck & Co., Inc. Securities, Derivative, & 'ERISA' Litigation*, 543 F.3d 150 (3d Cir. 2008) (hereinafter "*Merck*") informs our decision here. In *Merck*, we were faced with a similar set of factual circumstances: after a long-term clinical study of Merck's own blockbuster drug, Vioxx, the company published a questionable interpretation of the study's results, allegedly in order to boost Vioxx's sales and Merck's stock price. The questionable interpretation advanced by Merck attempted to explain why patients taking Vioxx experienced a higher rate of negative cardiovascular events than patients taking the study's comparator drug, naproxen. This so-called naproxen hypothesis emphasized the possibility that naproxen had a positive impact on the cardi-

ovascular system, and discounted the possibility that Vioxx had a negative impact.

The science behind this explanation was debatable, and, consequently, the FDA scolded Merck for its repeated promotion of the naproxen hypothesis. In a public warning letter issued to Merck, the FDA called the marketing campaign for Vioxx "false, lacking in fair balance, or otherwise misleading . . . . and [minimizing of] the potentially serious cardiovascular findings." *Id.* at 156 (internal citations and quotations omitted). The FDA ordered Merck to send letters to doctors in order "to correct false or misleading impressions and information." *Id.* at 157. Despite the public nature of these strong words, as well as, *inter alia*, news reports questioning the naproxen hypothesis and consumer lawsuits alleging negative cardiovascular effects from Vioxx, we found that investors were not on inquiry notice of securities fraud.

Most importantly for our purposes here, Merck found that inquiry notice, in securities fraud suits, requires storm warnings indicating that defendants acted with scienter. "Thus, to trigger storm warnings of culpable activity, in the context of a claim alleging falsely-held opinions or beliefs, investors must have sufficient information to suspect that the defendants engaged in culpable activity, i.e., *that they did not hold those opinions or beliefs in earnest.*" *Id.* at 166 (emphasis added) (internal citations and quotations omitted).

Accordingly, for investors to be on inquiry notice of § 10(b) claims, there must be some indication that defendants did not, in fact, hold the views expressed. Inquiry notice requires storm warnings of "culpable activity." *See Benak*, 435 F.3d at 400. Under § 10(b), a corporation does not engage in culpable activity

unless it acted with scienter.[4] Scienter is not incidental to § 10(b), it is elemental.[5]

In support of a finding of inquiry notice in February 2001, defendants point to the drop in the price of Pharmacia's stock, the FDA staff reports, the Advisory Committee meeting, analyst reports discussing the events at the FDA, and the fact that the full length of the CLASS study had long been publicly known. Whatever else those facts may have indicated, they did not provide storm warnings of possible fraud.

For one thing, the drop in stock price following the events of February 6-8, 2001 did not indicate fraud or even the possibility of fraud. Rather, the drop in price is easily explained by the fact that the market had been expecting that the FDA would approve a label change. When the Advisory Committee issued a neg-

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[4] Thus, as defamation is not assault, so is § 10(b) not § 11. Section 11 does not require a plaintiff to plead or to prove scienter; § 10(b) does. This is a distinction with a difference, both in terms of what a plaintiff must show for recovery *and* in terms of what information must be available for inquiry notice to take hold. We did not find it necessary in *Merck* to discuss § 11, nor do we find it necessary to do so here. Were this is a § 11 case, which it is not, the evidence in the public realm as of February 2001 might well have given rise to storm warnings of misstatements, and thus triggered the second step of the inquiry notice analysis—the duty to investigate potential claims.

[5] "To state a valid claim under Rule 10b-5, a plaintiff must show that the defendant (1) made a misstatement or an omission of a material fact (2) *with scienter* (3) in connection with the purchase or the sale of a security (4) upon which the plaintiff reasonably relied and (5) that the plaintiff's reliance was the proximate cause of his or her injury." *Semerenko v. Cendant Corp.*, 223 F.3d 165, 174 (3d Cir. 2000) (emphasis added); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (requiring more than evidence of negligence in § 10(b) cases).

ative recommendation, the market reacted accordingly. But mere investor disappointment does not *ipso facto* imply fraud.

Neither, in our view, does the content of the FDA staff reports suggest fraud. Defendants rely on a handful of words in those reports: to wit, "not valid," "unclear," and "not convincing." (JA 666, 631, 472.) But the staff reports span over 250 pages of highly complex scientific and statistical analysis. These few words and phrases, lacking in accusatory intent and buried like needles in a haystack, could not give rise to storm warnings of fraud.[6]

The Advisory Committee meeting and concomitant negative recommendation also could not give rise to storm warnings of fraud; indeed, the transcript of the Advisory Committee meeting explicitly supports a finding that the experts believed that the dispute between defendants and the FDA was a good faith, legitimate scientific dispute. We note, for example, the following statements made at the Advisory Committee meeting:

> [FDA Representative]: Just to add a couple of other comments to that, . . . I don't think that there were differences between us and the company that were meaningful in terms of the findings of the analyses that were done.
>
> We spent more time describing certain analyses and the company spent more time describing other analyses, but I don't think there is any dispute that we have with what the company presented, and I think that the company understands where we were coming from with our

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[6] Additionally, one of the staff reports described the disputed six-month model as a "potentially supportive analysis." (JA 482.)

> analyses, and I don't think that they are off target either in terms of how the company sees them.

(*Id.* at 1189.)

> [Advisory Committee Consultant]: The challenge here for me is that it seems to me *everybody is speaking truth*. I agree with everyone who speaks. I agree with the sponsor and their emphasis, I agree with the FDA in their description . . . . It depends on which piece of this you pick out.

(*Id.* at 1154 (emphasis added).)

As should be evident by these statements, the Advisory Committee simply did not believe that anything untoward had occurred, and we obviously will not expect more of the reasonable investor than we would expect of experts on the FDA's Advisory Committee.

Arguably the most troublesome pieces of evidence came in the form of two analyst reports discussing the events at the FDA: a JP Morgan report stated that the use of the truncated data was "unjustified and invalid," and Bloomberg News stated that defendants could only show a benefit "by looking at selected parts of the data—a practice discouraged by the [FDA]." (*Id.* at 714, 719.) Yet even in conjunction with the other evidence to which defendants point, we simply cannot conclude that these statements would alert a reasonable investor that *fraud*, as opposed to a mere disagreement over the best method of scientific analysis, had occurred.

Defendants also argue that storm warnings existed by February 2001 because no new information was revealed at that time or later: it was always known that the CLASS study lasted longer than six months.

But while defendants had acknowledged in April 2000 that the study lasted 13 months, there was no indication that they deliberately withheld data from JAMA, or improperly massaged the data, until the Washington Post article in August 2001. The mere fact that the study lasted thirteen months, and that there was a technical dispute between scientists about whether to use the full data or only a portion of the data, would not have provided storm warnings of fraud to the reasonable investor.[7]

Finally, defendants' own reassuring statements after the Advisory Committee meeting foreclose their argument here. In reaction to the Advisory Committee's negative recommendation, defendants defended the results of the CLASS study, and their use of the truncated data. Defendants stated that they had a "compelling case" for a label change, and that it had been "difficult for the [Advisory Committee] to analyze" the study because it was "an extremely rigorous and complex trial." (*Id.* at 171, 1519.)

These reassuring statements operate as a sort of antidote to any storm warnings that may have existed. *See, e.g., Merck*, 543 F.3d at 167 n.14 ("We have recognized that reassurances can dissipate apparent storm warnings if an investor of ordinary intelligence would reasonably rely on them to allay the investor's concerns.") (internal citations and quotations omitted). Just as we require investors to act upon public information indicating fraud, so, too,

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[7] In a different context in this litigation, even defendants' counsel acknowledged as much: "Well, what does that show? That scientists can disagree on how you interpret the data. That doesn't make fraud. That means people have different interpretations." (JA 2028 (argument in opposition to class certification).)

do we allow them to rely upon corporate statements discounting the possibility of malfeasance.[8]

The totality of the evidence in the public realm as of February 2001 did not indicate a possibility of fraud or even hint at any malfeasance or intentional impropriety; rather, the evidence only supported the view that there existed a legitimate dispute over scientific and statistical models.[9] But for inquiry notice of § 10(b) claims, we require some reason to suspect that defendants did not genuinely believe the accuracy of their statements. No such evidence surfaced until the publication of the Washington Post article which stated that defendants withheld data from JAMA.

We conclude that investors are not put on inquiry notice of fraud when, in the context of this case, an

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[8] Corporations are, of course, unlikely to admit to culpable conduct, and we do not purport to state a rule that precludes a finding of inquiry notice until they do so. But, under circumstances such as these, where the evidence of wrongdoing is entirely speculative, reassuring statements are a relevant consideration.

[9] Indeed, after the events of February 2001, reports portrayed Celebrex's outlook positively, and took seriously defendants' truncated analysis. (*See, e.g.*, JA 716 (JP Morgan analysis stating there is some "support[] [for Pharmacia's] contention that there was a [justified reason to limit the analysis to six months], but the FDA statisticians dispute this"); *id.* at 1707-08 (calling "the scientific evidence on this question . . . unclear").)

Additionally, numerous financial analysts retained Pharmacia's stock at a "buy" or "strong buy" rating. *See Merck*, 543 F.3d at 157-58 (noting that, during the relevant period, "securities analysts were of one voice in their projections for Merck and Vioxx; . . . all maintained their ratings for Merck stock at 'buy' or 'hold' and/or continued to project increased future revenues for Vioxx").

apparently legitimate scientific dispute arises between the FDA and a pharmaceutical company, and note that the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4, itself suggests this conclusion. A rule that would place investors on inquiry notice of fraud the moment that the FDA questions the seemingly good faith scientific analysis of a pharmaceutical company would encourage putative plaintiffs to file premature securities suits. In imposing heightened pleading requirements, Congress evinced an intent to discourage such suits; our inquiry notice jurisprudence reflects this intent.

For inquiry notice to take hold, there must be some indicia of potential malfeasance. Because no such indicia existed here, we will vacate the District Court's grant of summary judgment.[10]

B. Length of the Class Period

Largely for the reasons discussed above, we also find that the District Court erred in terminating the class period in February 2001. Particularly in light of defendants' repeated defense of the CLASS study and their optimism regarding a potential label change, it was reasonable for plaintiffs to rely upon defendants' statements until the publication of the Washington Post article on August 5, 2001.[11] *Cf. Basic, Inc. v. Le-*

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[10] We note that inquiry notice—in securities fraud suits and otherwise—is alive and well in this Court. Neither in *Merck* nor here have we replaced inquiry notice with an actual notice standard. Here, we merely conclude that, in the absence of any indication that defendants did not believe the truth of their own statements, investors were not on inquiry notice of § 10(b) claims.

[11] The appropriate date is August 5, 2001, and not the later date, May 31, 2002, of the British Medical Journal article. As of August 5, 2001, investors should have known that there was a

vinson, 485 U.S. 224 (1988) (outlining presumption of reliance in fraud-on-the-market securities suits). Accordingly, we will reverse the Court's order limiting the class period to February 5, 2001.[12]

C. Cross-Appeal

1. Motion to Dismiss

The District Court correctly denied defendants' motion to dismiss. In that motion, defendants asserted that plaintiffs failed to meet the pleading requirements of the PSLRA, focusing on the admittedly thin two paragraphs of the Amended Complaint labeled "Scienter Allegations." (JA 270-71.) When examined as a whole, however, the Amended Complaint is replete with allegations that defendants acted with the requisite scienter. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2509 (2007) (requiring courts to "consider the complaint in its entirety"). In particular, the Amended Complaint documents the alleged scheme to trick JAMA, and thus the investment community, by using only the truncated data.

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possibility that defendants' claims were false. Any new information found in the British Medical Journal article is different in only degree, and not in kind.

[12] Plaintiffs also challenge the District Court's decision to seal the record and presumably our decision to continue the seal pending appeal. We will leave the question of continued sealing to the District Court. We note, however, that we are unpersuaded by the Court's reliance on the so-called "self-critical analysis privilege" as a basis for sealing. The self-critical analysis privilege has never been recognized by this Court and we see no reason to recognize it now. *Cf. Union Pac. R.R. Co. v. Mower*, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000) (calling the privilege "novel," and noting that the Ninth Circuit has not recognized the privilege).

While it is true that a legitimate disagreement over scientific data does not give rise to a securities fraud claim, plaintiffs alleged something quite different: a bad faith misrepresentation of scientific data. Those allegations are sufficient to withstand the "[e]xacting pleading requirements" of the PSLRA, which require that the allegations give rise to a strong inference of scienter. *See, e.g., Tellabs, Inc.*, 127 S. Ct. at 2504-10. The District Court correctly denied defendants' motion to dismiss.

2. Class Certification

Defendants also argue that the District Court's decision to grant plaintiffs' motion for class certification was in error. The gravamen of this argument is that the results of the CLASS study were immaterial as a matter of law in light of the lack of movement in stock price following the initial release of those results in April 2000. We disagree.

Plaintiffs' own expert acknowledges that the announcement of the results of the CLASS study "had little measurable effect on [Pharmacia's] stock price." (JA 1298.) But that fact does not negate a finding of materiality when the market was *expecting* that the results of the study would be positive, and plaintiffs have presented evidence indicating precisely that. (*See id.* (citing Morgan Stanley report written the day after the CLASS study results were released that states, "we are making no change to our forecasts, as we had anticipated the study to corroborate the strong safety profile of the product").) And, of course, the materiality of the alleged misrepresentations is self-evident when we look at the market's negative reaction—to the tune of a nine-percent drop in stock

price in three days—when defendants' analysis of the CLASS study was questioned in February 2001.[13]

V. Conclusion

For the foregoing reasons, we will vacate the judgment of the District Court, and remand for proceedings consistent with this Opinion.

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[13] We also reject, without further discussion, defendants' argument that the District Court erred in denying their motion to strike certain documents.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 07-4500 & 07-4564

ALASKA ELECTRICAL PENSION FUND; CITY OF SARASOTA FIREFIGHTERS' PENSION FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSIONPLAN; NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND; PACE INDUSTRY UNION-MANAGEMENT PENSION FUND; CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, as Class Representatives, on behalf of themselves and all other similarly situated

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District Judge: The Honorable Anne E. Thompson

Present: SCIRICA, *Chief Judge*, SLOVITER, BARRY, AMBRO, FISHER, CHAGARES, and JORDAN, *Circuit Judges*, and RESTANI,* *Judge*

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing en banc filed by Appellees/Cross-Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: 3 March 2009

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* Honorable Jane A. Restani's, Chief Judge, United States Court of International Trade, vote is limited to panel rehearing only.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed 10/30/2007]

ALASKA ELECTRICAL PENSION FUND, *et al.*,

Plaintiffs,

v.

PHARMACIA CORPORATION, *et al.*,

Defendants.

Civil No. 03-1519 (AET).

MEMORANDUM AND ORDER

THOMPSON, U.S.D.J.

INTRODUCTION

This matter comes before the Court on behalf of Defendants Pharmacia Corporation ("Pharmacia"), Pfizer, Inc., Fred Hassan, Dr. G. Steven Geis, and Carrie Cox's (collectively, "Defendants") Motion for Summary Judgment [145]. The Court has decided this motion based upon the submissions and oral arguments of the parties on September 12, 2007. For the reasons stated below, Defendants' motion is granted.

BACKGROUND

A. Procedural Background

This case arises from Defendants' effort to remove the standard gastrointestinal ("GI") warning on the

label of the drug Celebrex. On April 7, 2003, Plaintiffs filed a complaint alleging that Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, by misrepresenting the results of a clinical study of Celebrex. On January 25, 2007, the Court certified a class consisting of purchasers of Pharmacia common stock during the period of April 17, 2000 to February 6, 2001. On May 31, 2007, Defendants filed a Motion for Summary Judgment claiming that Plaintiffs' complaint is time-barred.

B. Factual Background

From approximately September 1998 to March 2000, Pharmacia commissioned a clinical study of Celebrex entitled, The Celecoxib Long-Term Arthritis Safety Study ("CLASS"), to support an application to the Food and Drug Administration ("FDA"), that sought to remove the standard GI warning from its label. (*See* Declaration of William A. Dreier ("Dreier Decl."), Ex. 2 at 1247.)

On approximately June 12, 2000, Pharmacia submitted all of the data from CLASS to the FDA to support its application. (Dreier Decl., Ex. 11.) In addition, Pharmacia included "Briefing Documents," setting forth its own analysis of the data from CLASS, and recommending that the FDA analyze only results from the first six months of the study ("six-month analysis"), rather than the results from the entire thirteen-month study. (Dreier Decl., Ex. 13 at 1; *id.*, Ex. 14 at 1.)

On September 13, 2000, the results of CLASS were published in the Journal of the American Medical Association ("JAMA") (*Id.*, Ex. 1 ¶ 45; *id.*, Ex. 2.) However, only the results from the six-month analy-

sis were published in the JAMA article, results that were favorable to Pharmacia. (*Id.*, Ex. 2 at 1253-54.) Moreover, it was Defendants who supplied JAMA with information on CLASS, and thus, were largely responsible for the contents of the article.

On February 6, 2001, the FDA posted the Briefing Documents submitted by Pharmacia to its website. The FDA also posted reports ("FDA Staff Reports") by two medical officers and a statistician. These reports analyzed the CLASS data from the entire thirteen-month study submitted to the FDA. *See* http://www.fda.gov/ohrms/dockets/ac/01/briefing/3677b1.htm (last visited Oct. 25, 2007). On February 7, 2001, both the Briefing Documents and FDA Staff Reports were available to the public on the FDA website. *Id.* The reports concluded that using data from only the first six months, as opposed to the entire thirteen-month study, was "not valid" and "not convincing," and opined that "the most critically relevant analysis covers the complete study period." (Dreier Decl., Ex. 15 at 8-9; *id.*, Ex. 13 at 14, 24.)

On February 7, 2001, an advisory committee, comprising FDA-appointed independent experts ("Arthritis Advisory Committee"), held a public hearing to consider Pharmacia's request to remove or modify the standard GI warning from the Celebrex label. (Dreier Decl., Ex. 21.) The Arthritis Advisory Committee recommended that the standard GI warning remain. (*Id.*) The decision and impact of the hearing were widely reported in analyst reports and the media on, and after, February 7, 2001.

On August 5, 2001, the Washington Post published an article stating that Defendants had deceived JAMA into publishing an article containing incomplete data. (Dreier Decl., Ex. 44.) The article stated

that Defendants did not provide JAMA with any of the negative post-six-month CLASS data. (*Id.*)

APPLICABLE LAW

A. Standard for Summary Judgment

A party seeking summary judgment must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996).

In deciding whether there is a disputed issue of material fact, the Court must view the underlying facts and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 231 (3d Cir. 1987). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (noting that no issue for trial exists unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict in its favor).

In deciding whether triable issues of fact exist, Rule 56(e) of the Federal Rules of Civil Procedure provides, in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allega-

> tions or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). The rule does not increase or decrease a party's ultimate burden of proof on a claim. Rather, "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson,* 477 U.S. at 255.

The nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex,* 477 U.S. at 324; *see also Lujan v. National Wildlife Fed.,* 497 U.S. 871, 888 (1990) ("[T]he object of [Rule 56(e)] is not to replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit"); *Anderson,* 477 U.S. at 249; *Big Apple BMW, Inc. v. BMW of N. Am., Inc.,* 974 F.2d 1358, 1363 (3d Cir. 1992) ("to raise a genuine issue of material fact . . . the [nonmoving party] need not match, item for item, each piece of evidence proffered by the movant," but rather must exceed "the 'mere scintilla' threshold"), *cert. denied,* 507 U.S. 912 (1993).

B. Statute of Limitations and the Standard for Inquiry Notice

A claim for securities fraud under Sections 10(b) and 20(a) of the Exchange Act must be brought no later than the earlier of "(1) two years after the

discovery of the facts constituting the violation, or (2) five years after such violation." 28 U.S.C. § 1658(b). The triggering of the "two years after discovery of the facts" prong is based on an inquiry notice standard. In this case, the "two year after the discovery of the facts" prong of the statute is controlling, as inquiry notice under both parties' arguments would be found before the alternate five-year limitation.

Inquiry notice is found "whenever circumstances exist that would lead a reasonable investor of ordinary intelligence, through the exercise of reasonable diligence, to discover his or her injury." *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 251 (3d Cir. 2001). It is not necessary for a plaintiff to have "actual knowledge or know all of the details of the alleged fraud to trigger the [running of the] limitations period." *In re Merck & Co. Sec., Deriv & "ERISA" Litig.*, MDL No. 1658, C.A. Nos. 05-1151, 2007 WL 1100820, at *10 (D.N.J. Apr. 12, 2007) (citing *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002)).

To determine inquiry notice, the Court looks to see if plaintiffs had sufficient information to excite "storm warnings" of culpable activity. "Storm warnings" include "the accumulation of information over a period of time that conflicts with representations that were made when the securities were originally purchased, or any financial, legal, or other data that would alert a reasonable person to the probability that misleading statements or significant omissions had been made." *In re NAHC*, 306 F.3d at 1326 n.5. The existence of "storm warnings" is an objective inquiry. *Mathews*, 260 F.3d at 252 ("Plaintiffs need not be aware of the suspicious circumstances or understand their import. It is enough that a reasona-

ble investor of ordinary intelligence would have discovered the information and recognized it as a storm warning"). Plaintiffs need not know all of the details or narrow aspects of the alleged fraud to trigger the limitations period; instead, the period begins to run from the "time at which plaintiff should have discovered the general fraudulent scheme." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 975 F. Supp. 584, 599 (D.N.J. 1997).

The defendants bear the initial burden of showing the existence of storm warnings. *Mathews,* 260 F.3d at 252. Once storm warnings rise to inquiry notice and trigger the statute of limitations, plaintiffs must investigate the basis for their claims. *In re NAHC,* 306 F.3d at 1326. If a defendant succeeds in establishing inquiry notice, the "burden shifts to the plaintiffs to demonstrate that they were unable to discover their injuries despite the exercise of reasonable due diligence." *In re Merck,* 2007 WL 1100820, at *10. If a plaintiff's claims are time-barred under the inquiry notice standard, then summary judgment in favor of the defendant is appropriate. *See Mathews,* 260 F.3d at 250.

DISCUSSION

Defendants argue that Plaintiffs were on inquiry notice no later than February 7, 2001. Therefore, since Plaintiffs' complaint was filed on April 7, 2003, it is time-barred under the two-year statute of limitations set forth in 28 U.S.C. § 1658(b). In support, Defendants assert that the February 7, 2001 postings of the Briefing Documents and the FDA Staff Reports on the FDA website, the Arthritis Advisory Committee public hearing, and widespread media and financial analyst coverage of these materials and proceedings, constituted "storm warnings" that placed Plain-

tiffs on inquiry notice of Defendants' alleged misrepresentations.

The Briefing Documents published on the FDA website, presented several analyses of the CLASS data, including: (1) an analysis as specified in the original study protocol, that is, based upon data from the entire study period and the original primary endpoint, and (2) an alternative analysis based upon six-months of data favored by Pharmacia. (Dreier Decl., Ex. 12.) However, the FDA Staff Reports posted on the FDA's website on February 7, 2001, disagreed with the alternative analysis set forth in the Briefing Documents, and opined that "the most critically relevant analyses covers the complete study period as specified in the original protocol." (Dreier Decl., Ex. 15; *id.*, Ex. 13.)

Further, the Arthritis Advisory Committee hearing on February 7, 2001, reiterated that the complete study period was the proper analysis, and recommended that the standard GI warning remain on the Celebrex label. (Dreier Decl., Ex. 22 at 1.) Moreover, the information on the FDA website, and the Arthritis Advisory Committee's decision was widely reported in analyst reports and the media. By way of example, but not exhaustive, analysts and media reported as follows[1]

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[1] *See also* February 6, 2001, *Reuters News Service*, "Celecoxib did not demonstrate statistically superiority to NSAIDS . . . at any point in the trial." (Dreier Decl., Ex. 18.); February 8, 2001, *Chicago Tribune* article entitled "Tests Fail to Show Celebrex Drug Safer Than Rivals," ("committee members said they saw no edge for Celebrex over treatments such as ibuprofen when comparing rates of the most serious ulcers.") (*Id.*, Ex. 23.); February 7, 2001, *Reuters News Service*, "There is no clinically meaningful safety advantage in upper (gastrointestinal) safety."

- February 6, 2001, *Bloomberg News* article entitled "Pharmacia Hasn't Shown Celebrex Safety Benefit, FDA Review Says"

  > Only by looking at selected parts of the data—a practice discouraged by the agency—was the company able to show a benefit, the reviewers said. (Dreier Decl., Ex. 17.)

- February 7, 2001, *Star-Ledger* article entitled "Firms Await FDA Word on 2 Rival Painkillers"

  > FDA documents released yesterday in advance of the [advisory committee] meeting showed an agency review of Celebrex found the drug isn't significantly less likely to cause stomach problems than the older, cheaper painkillers. (Dreier Decl., Ex. 20.)

(*Id.*, Ex. 25.); February 8, 2001, *Washington Post*, "There's no proof that-much promoted arthritis drug Celebrex is gentler on the stomach than older, cheaper painkillers, the government's scientific advisors decided." (*Id.*, Ex. 27.); February 8, 2001, *Orlando Sentinel* article entitled "Celebrex Fails to Impress." (*Id.*, Ex. 29.); February 8, 2001, *Milwaukee Journal Sentinel*, "the ruling was a blow to manufacturer Pharmacia Corp., which had hoped the advisors would recommend that the [FDA] quit requiring that Celebrex bear a warning that users risk ulcers." (*Id.*, Ex. 30.); February 8, 2001, *Asbury Park Press* article entitled "FDA Disputes Arthritis Drug Claim." (*Id.*, Ex. 31.); February 8, 2001, *CBS Marketwatch.com*, "a panel found that Pharmacia couldn't show that Celebrex cause fewer gastrointestinal side effects than pain relievers of another class of treatments." (*Id.*, Ex. 32.); February 9, 2001, *CNBC Market Week With Maria Bartiromo*, "Pharmacia was really beaten back this week by a setback from the FDA on a labeling issue." (*Id.*, Ex. 35.); February 9, 2001, *Pittsburgh Post-Gazette* article entitled "FDA Rules Agaist Vioxx, Celebrex Labels." (*Id.*, Ex. 36.); February 9, 2001, *Salt Lake Tribune* article entitled "FDA Says Celebrex Not Easier On Stomach." (*Id.*, Ex. 37.)

- February 7, 2001, *J.P. Morgan Analyst Report*, entitled "FDA Review of Celebrex More Negative Than Expected-Panel Could be Controversial"

  > The four main issues raised by the FDA are: (1) Pharmacia's analysis of data at only the 26-week time point, rather than the 52-week time point, is unjustified and invalid (and the data is even less robust at 52 weeks) (Dreier Decl., Ex. 16.)

- February 7, 2001, *Philadelphia Inquirer* article entitled "FDA Report Questions Claims about Celebrex Painkiller"

  > A Food and Drug Administration advisory report said Pharmacia Corp. had not shown that its Celebrex painkiller was less likely to cause stomach bleeding than the older treatments . . . [t]he FDA review of a trial of Celebrex could mean problems for Pharmacia today when it asks and FDA advisory panel to endorse claims that the drug is safer than traditional painkillers. (Dreier Decl., Ex. 19.)

In contrast, Plaintiffs argue that the statute of limitations period does not begin to run until plaintiffs have notice that the defendants acted with the requisite scienter. (Pls.' Opp'n. 21.) Plaintiffs assert that requisite scienter was not shown until August 5, 2001, when the Washington Post article was published. Therefore, Plaintiffs claim that they were not on inquiry notice until August 5, 2001. Under Plaintiffs' theory, their complaint was filed well within the two-year statute of limitations. However, the Court finds this argument untenable. Inquiry notice exists when Plaintiffs discovered, or in the exercise of reasonable diligence, should have discovered the gen-

eral fraudulent scheme. *In re NAHC,* 306 F.3d at 1326. Plaintiffs need not have discovered the precise profile of the alleged fraud, nor been prepared to draft a complaint for a lawsuit at the time inquiry notice arises. *Id.* at 1327. So long as sufficient "storm warnings" are on the horizon, inquiry notice may be found to exist.

Additionally, Plaintiffs argue that "[D]efendants' public, reassuring statements justifying the six-month analysis prevented plaintiffs from being put on inquiry notice." (Pls.' Opp'n. 28.) However, the Court is not persuaded that assurances from Defendants in the months before and after the publication of the Briefing Documents, the FDA Staff Reports, and the Arthritis Advisory Committee public hearing, counterbalanced and offset the storm warnings. Although reassurances given by a company may dissipate storm warnings, an investor may not reasonably rely on words of comfort from management "when there are direct contradictions between the defendants' representations and the other materials available to plaintiffs regarding the possibility of fraud." *In re Exxon Mobile Corp. Sec. Litig.*, 387 F. Supp. 2d 407, 418 (D.N.J. 2005).

The Court determines that there were sufficient "storm warnings" no later than February 9, 2001, to place Plaintiffs on inquiry notice. A reasonable investor would have discovered this public, company-specific information, and recognized it as storm warnings. The February 7, 2001 publications of the Briefing Documents, the FDA Staff Reports on the FDA website, the FDA Arthritis Advisory Committee public hearing, and the media and financial analyst coverage of these materials and proceedings, consti-

tuted storm warnings sufficient to place Plaintiffs on inquiry notice of their claims.

Plaintiffs' complaint is time-barred as it was brought on April 7, 2003, more than two years after Plaintiffs were on inquiry notice. Therefore, Defendants' Motion for Summary Judgment is granted.

CONCLUSION

For the reasons given above, and for good cause shown,

It is on this 29th day of October 2007,

ORDERED that Defendants' Motion for Summary Judgment [145] is GRANTED; and it is further

ORDERED that Plaintiffs' Motion to Seal [150] is DENIED as moot; and it is further

ORDERED that Plaintiffs' Motion to Strike [151] is DENIED as moot; and it is further

ORDERED that Defendants' Motion to Seal [155] is DENIED as moot; and it is further

ORDERED that Defendants' Motion to Strike [156] is DENIED as moot; and it is further

ORDERED that Defendants' Cross-Motion to Strike [157] is DENIED as moot; and it is further

ORDERED that Plaintiffs' Motion to Seal [162] is DENIED as moot; and it is further

ORDERED that Defendants' Motion to Seal [166] is DENIED as moot; and it is further

ORDERED that Plaintiffs' Motion to Seal [168] is DENIED as moot; and it is further

ORDERED that Plaintiffs' Motion for Leave to Appear Pro Hac Vice [174] is DENIED as moot; and it is further

ORDERED that this case is closed.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed 05/20/2004]

ROBERT L. GARBER, *et al.*,

Plaintiffs,

v.

PHARMACIA CORP., *et al.*,

Defendants.

Civil No. 03-1519 (AET)

ORDER

THOMPSON, U.S.D.J.

This matter comes before the Court on the motion of Defendants to dismiss this action pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6), and on the motion of Plaintiffs to strike certain exhibits attached to Defendants' motion to dismiss; and the Court, having reviewed the submissions of the parties and having heard oral argument on May 17, 2004, and for good cause shown,

It is on this 19th day of May, 2004,

ORDERED that Defendants' motion to dismiss is DENIED; and it is further

ORDERED that Plaintiffs' motion to strike is DENIED.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

APPENDIX E

TITLE 15—COMMERCE AND TRADE

CHAPTER 2B—SECURITIES EXCHANGES

Sec. 78u-4. Private securities litigation

* * *

(b) Requirements for securities fraud actions

* * *

(2) Required state of mind

In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(June 6, 1934, c. 404, Title I, § 21D, as added and amended Dec. 22, 1995, Pub. L. 104-67, Title I, § 101(b), Title II, § 201(a), 109 Stat. 743, 758; Nov. 3, 1998, Pub. L. 105-353, Title I, § 101(b)(2), Title III, § 301(b)(13), 112 Stat. 3233, 3236.)

APPENDIX F

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART V—PROCEDURE

CHAPTER 111—GENERAL PROVISIONS

Sec. 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

* * *

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

(Added Pub. L. 101-650, Title III, § 313(a), Dec. 1, 1990, 104 Stat. 5114, and amended Pub. L. 107-204, Title VIII, § 804(a), July 30, 2002, 116 Stat. 801.)